

Decision **DRAFT DECISION OF ALJ MALCOLM** (Mailed 2/5/2004)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of SBC Pacific Bell Telephone Company (U 1001 C), a corporation, for Authority to Categorize Local DA Service as a Category III Service.

Application 02-07-050
(Filed July 31, 2002)

OPINION DISMISSING APPLICATION AND CLOSING PROCEEDING

I. Summary

This order grants Pacific Bell Telephone Company's (SBC California) motion to dismiss this application and closes the proceeding. This proceeding is closed for a period of two years, during which time we intend to reject any filing of SBC California that seeks recategorization of its directory assistance (DA) services. It states our intent to use the record in this proceeding in any future application, should one be filed. Finally, it authorizes Greenlining Institute (Greenlining) and The Utility Reform Network (TURN) to seek intervenor compensation for their work in this case.

II. Background

On July 31, 2002, SBC California filed the above-entitled application (Application) seeking maximum pricing flexibility for its DA services as a "Category III" service. The Application stated that the market for local DA in California had become fully competitive, meeting the criteria for reduced

regulatory oversight. The Commission's Office of Ratepayer Advocates (ORA) and TURN protested the application.

On April 22, 2003, the then-assigned Administrative Law Judge (ALJ) published a proposed decision for comment that would have dismissed the Application without prejudice to permit the Commission to address higher priority proceedings. On August 1, 2003, Commissioner Susan P. Kennedy issued a proposed alternate decision that would have granted SBC California's request to pursue its Application. Prior to the Commission meeting on August 21, 2003, the Commission withdrew both proposed decisions from its meeting agenda. The Application has since proceeded as originally requested by SBC California. The Assigned Commissioner subsequently issued a scoping memo and ruling, identifying relevant issues on the basis of parties' written comments and the prehearing conference (PHC). The scoping memo scheduled evidentiary hearings and stated the Commission's intent to conduct public participation hearings (PPHs) in early 2004.

On November 14, 2003, SBC California tendered for filing a "Notice of Withdrawal of Application." Among other things, the pleading stated SBC California's view that "SBC California's application is not being and would not be evaluated solely based on the evidentiary record or Commission precedent." The pleading stated a general objection to elements of the scoping memo and the Commission's decision to hold PPHs.

On November 21, 2003, the assigned ALJ issued a ruling rejecting the filing of SBC California's November 14 pleading, finding the applicant does not have authority to withdraw its application and that the Commission has sole authority to dismiss or close a proceeding. The ruling suggested that SBC California could file a motion to withdraw the application. It directed SBC California to inform

the Commission as to the status of notice to customers of the PPHs, notice of which has been previously required by the assigned ALJ.

On November 25, 2003, SBC California delivered a letter to the Commission explaining that it had not taken any steps to notify its customers of the PPHs because it had decided not to pursue its application. On December 3, 2003, SBC California filed a motion to withdraw its application. The motion is silent as to the reasons for the proposed withdrawal of the application. ORA and TURN subsequently filed a response to the motion.

On December 5, 2003, the assigned ALJ issued a ruling suspending the schedule and discovery in this proceeding, but otherwise directing parties to conduct themselves in a manner that recognizes the proceeding is open and active until and unless the Commission closes it.

III. November 21, 2003 Notice of Withdrawal

We hereby affirm the ALJ's ruling which rejected the filing of SBC California's November 21 "Notice of Withdrawal of Application." The ALJ's ruling correctly finds that only the Commission has the authority to close or dismiss a contested proceeding. (Decision (D.) 92-04-027, D.03-07-032.)

Because the November 21, 2003 pleading was never filed in its original form, we do not address its allegations here in any depth. We affirm, however, that SBC California has not presented any evidence to suggest it cannot expect a decision based on the record evidence of the proceeding. SBC California has not on the record of this proceeding appealed any element of the scoping memo or objected to the Commission's decision to conduct PPHs. In fact, SBC's attorney stated that SBC would not oppose PPHs at the November 19, 2002 PHC (TR 39), as follows:

ALJ Bemesderfer: “Does Pacific Bell have any thoughts about the desirability of public participation hearings?”

Mr. Thompson: “Pacific Bell would not oppose them.”

In its comments on the proposed decision, SBC California asserts the proposed decision’s reference to this transcribed comment “is taken entirely out of context and is, therefore, misleading.” It makes this claim on the basis that it objected to evidentiary hearings. It is true that SBC California objected to hearings in this case but we find no evidence in the record of the proceeding that SBC California objected to PPHs. The proposed decision does note that SBC California objected to PPHs during a conference call between the ALJ, SBC California and several parties on October 14, 2003. During that call, SBC California’s counsel was told by the assigned ALJ that she did not have authority to overturn the scoping memo and suggested filing a motion to modify the scoping memo’s requirement that the Commission conduct PPHs. Accordingly, the assertion that the proposed decision is misleading is without support.

To SBC California’s claim that the Commission has never conducted PPHs for a recategorization of a service, it should be noted that the Commission is not bound by the policies or practices adopted by past decisions as long as it has provided notice and an opportunity to be heard, consistent with Pub. Util. Code § 1708. Finally, the Supreme Court has found that the Commission must conduct its proceedings in ways that promote the interests of the public. (*California Motor Transport Company vs. California Railroad Commission*, 30 Cal2d 184.) Accordingly, an applicant seeking Commission action on an issue of public concern should not be surprised if it is expected to submit its proposal to public scrutiny through a PPH.

IV. Standard for Withdrawal of Applications

SBC California seeks the withdrawal of its application and, presumably, the closure of this proceeding. ORA, Greenlining and TURN (Consumer Groups) filed a joint response to SBC California's motion. SBC California subsequently replied to Consumer Groups' pleading.

Consumer Groups argue that SBC California cannot unilaterally withdraw its application on matters of public concern, particularly where the Commission and parties have invested substantial time and resources litigating the application. Consumer Groups state that SBC California's motion does not provide a rationale for terminating the proceeding. Consumer Groups observe that SBC California opposed the ALJ's proposal to close this proceeding on the basis that the parties had spent significant time in pursuit of resolving related issues, suggesting the Commission would shirk its regulatory responsibilities if it summarily closed the proceeding. Because the Commission decided to proceed with the application at SBC California's urging, Consumer Groups suggest SBC California reimburse the Commission for expenses incurred after the issuance of the scoping memo.

Consumer Groups suggest that the Commission prohibit SBC California from refiling a request that local DA be subject to Category III regulation within five years after dismissal of this Application. Consumer Groups argue this condition of withdrawal would prevent SBC California from "forum shopping" or refiling when the circumstances are more favorable to it, and would deter future attempts to employ withdrawal as a strategy in other proceedings. Consumer Groups also suggest the Commission reaffirm the value of conducting PPHs on this issue and state that any future application regarding DA services will include such hearings.

SBC California responded to Consumer Groups' comments. It states that the Commission has routinely permitted withdrawals of applications and has only denied such withdrawals where an applicant is motivated to avoid an adverse outcome after hearings. It states it is not motivated by such concerns and is not forum shopping. It objects to any limitations on its ability to seek recategorization of DA services in the future and to Consumer Groups' recommendation that SBC California reimburse the Commission and parties for work in this proceeding.

Discussion

The Commission has sole authority to close a proceeding. An applicant's motion to withdraw its application does not by itself, close a proceeding or change its status in any way. Although the Commission has usually granted such motions, the Commission may deny motions to withdraw when doing so is in the public interest and pursue matters of public concern after an applicant has moved to withdraw an application. (D.89-09-025, D.01-02-017, D.01-02-040.) The Commission may impose conditions on future applications even after an application is withdrawn and a proceeding is closed. (D.01-02-040.). Notwithstanding a party's wish to terminate its involvement in a Commission proceeding, the Commission expects the full cooperation of the applicant and any other party. In these ways, the Commission is unlike a civil court overseeing a lawsuit between two parties and need not follow a civil court's procedures in the pursuit of its obligations to the broader public. Indeed, the California Supreme Court has found that the Commission has a duty to the public that transcends that of a civil court litigating the claims of specific parties.¹

¹ *Cal. Motor Transport Co. v. Railroad Comm.* (1947) 30 Cal. 2d 184.

SBC California alleges the Commission has developed a limited “standard” for denying motions to withdraw applications, namely, that an application may not be withdrawn for the purpose of avoiding an adverse outcome. The Commission articulated this justification for denying a motion to withdraw in D.92-04-027. The order, however, does not and could not limit the Commission’s discretion to deny a motion for withdrawal on other grounds and does not even suggest that a proceeding closes automatically at the discretion of the applicant.

Even assuming D.92-04-027 were an appropriate standard for denying a motion to withdraw an application, SBC California has not demonstrated, or even alleged, that its withdrawal is motivated by something other than a fear that its application will be denied. To the contrary, its November 12 "Notice of Withdrawal" suggests SBC California may have been motivated by a concern that the Commission would not grant its application. One cannot credibly allege unfairness of a decision-maker as justification for withdrawal of a motion while simultaneously arguing that one is not withdrawing to avoid an adverse outcome.

V. SBC California’s Failure to Comply with the ALJ’s Ruling Regarding Customer Notice for Hearings

On October 14, 2003, the ALJ assigned to this proceeding held a conference call with SBC California and other parties for the limited purpose of scheduling the PPHs anticipated by the scoping memo. During the conference call, SBC California’s attorney objected to the Commission’s plan to conduct PPHs. The ALJ stated the assigned Commissioner intended to move ahead with PPHs, consistent with the scoping memo, and referred SBC California’s attorney to his statement at the PHC that SBC California did not oppose PPHs. The ALJ

informed SBC California's attorney that if SBC California sought a change to the scoping memo, the appropriate procedural course was for SBC California to file a motion. To date, SBC California has not filed a motion objecting to PPHs nor the issues identified in the scoping memo.

Subsequently, on November 7, 2003, the ALJ informed SBC California and the parties to this proceeding of the dates, times and locations for PPHs. SBC California had previously informed the ALJ that it needed the hearing information no later than November 10, 2003 in order to publish and mail notices to customers of the hearings. On November 25, 2003, and in response to an ALJ Ruling dated November 21, 2003, SBC California sent a letter to the Commission stating that it had not taken steps to notify customers of the PPHs, as required by the ALJ on November 7. SBC California's letter asserts that its decision not to notify its customers of the hearings "was entirely reasonable" given SBC California's "decision not to proceed with the Application." Prior to this communication ordered by the ALJ, SBC California did not seek permission to suspend its duty to notify customers of the hearings or even notify the Commission of its intent to suspend this duty.

Discussion

A utility may not ignore a ruling or order of the Commission on the basis that it has an outstanding and unresolved motion before the Commission. SBC California acted in contravention of an ALJ ruling when it failed to proceed to publish and mail notices to its customers regarding the PPHs. Its failure to publish and mail customer notices effectively made moot the Commission's decision to conduct such hearings because, absent adequate customer notice, the Commission would not expect customer attendance at the hearings. Its failure to follow the ALJ's directive in this case may have been both logical and reasonable

from the standpoint of saving shareholder dollars and preventing the customer confusion that might have occurred had it gone forward with customer notices only to later receive a grant of its motion to withdraw. SBC California should have made these points in a motion seeking authority to suspend the ALJ's directive and the scoping memo in this regard rather than taking unilateral action in contravention of an ALJ's directive. We are confident that its motion would have been granted, assuming the circumstances are as we understand them.

In comments to the ALJ's draft decision in this case, SBC California argues that it did not violate a Commission directive when it failed to send customer notices of the PPHs by observing that it could have subsequently contacted its customers outside the normal billing cycle. It states it took the risk that it would have to incur the additional cost for a separate mailing when it let the November 10 date pass. This response incorrectly presumes that the ALJ's ruling provided SBC California a choice as to how it would notify its customers. Based on the representations of SBC California's attorney that the company required an approved customer notice by November 10 and discussions about the operation of SBC California's billing process, the ALJ directed SBC California to include the customer notice in bills issued during the normal billing cycle.

SBC California's decision to ignore an ALJ's ruling rather than seek relief from it is subject to fines authorized by §§ 2107 and 2108 and is tantamount to a violation of a Commission order. The Commission delegates authority to ALJs to conduct Commission proceedings and to take all procedural steps necessary to assure the fair and efficient management of those proceedings. (Rule 63.) If the Commission were to permit a party to ignore the authority of the ALJ, the

integrity of our proceedings would quickly deteriorate and our decision-making responsibilities would be hopelessly compromised.

Finally, Rule 1 of the Commission's Rules of Practice and Procedure require that any person authorized to represent a party in Commission proceedings "to maintain the respect due to the Commission, members of the Commission and Administrative Law Judges." Even though its reluctance to needlessly mail out notices had a certain logic, SBC California demonstrated a lack of respect for the Commission, the Assigned Commissioner and the assigned ALJ in this proceeding when it ignored an ALJ's directive and the underlying authority for her directive, a scoping memo and ruling signed by the Assigned Commissioner. By its incivility and impertinence toward the Commission and its officers, SBC's counsel debased the decorum that serves as a condition precedent to rational adjudication. We fully recognize that in the heat of litigation, advocates are sometimes impelled toward behavior they later regret. Here, however, evidence of such penance is scant. Because the admonishment inherent in this decision suffices to express our distaste for SBC California's conduct, we decline to find a Rule 1 violation. Our act of forbearance should not be interpreted as a belief that such a finding is not amply supported by the evidence.

Section 2107 and Section 2108 authorize the Commission to fine an utility for its failure to comply with "any part of provision of any order, decision, decree, rule, direction, demand or requirement of the Commission..." We would be within our authority to fine SBC California for its failure to comply with the directive of the ALJ and the ruling of the assigned Commissioner. In this case, SBC California's conduct caused no harm to consumers, shareholders or any party. We therefore do not impose any monetary penalties here. We nevertheless emphasize the seriousness of that conduct in order to protect the integrity of the process and procedures under which we operate.

VI. PPHs

Consumer Groups recommend the Commission express its intent to conduct PPHs in the event SBC California refiles an application to recategorize its DA services. SBC California objects to this proposal.

The decision of the assigned Commissioner in this proceeding to conduct PPHs was a reasonable and logical response to the application and its potential impacts. The Commission has a duty to conduct its procedures in ways that are responsive to the public's expressions of concern. In this case, the Commission has so far received more than 5,000 communications from consumers expressing concerns that SBC California's proposal would result in higher rates.²

Moreover, it is reasonable for the Commission to provide a forum that would promote consideration of all potential outcomes of an application, not just those identified by the applicant. Although SBC California proposes the standard of review in this case should be limited to whether SBC California has market power, this standard of review could obscure the potential impacts of SBC California's application. The application effectively asks the Commission to permit SBC California to price its DA services with wide discretion. As the record reflects, the price of SBC's DA services in other states is substantially higher than in California, where DA prices are capped. PPHs would provide members of the public a forum to address this issue.

We decline to commit a future Commission to PPHs because future Commissions must have discretion to design procedures that are responsive to

² The last time SBC (then Pacific Bell) sought to increase its DA rates in 1998 (Application (A.) 98-05-038, D.99-11-051), the Commission received over 34,000 letters from members of the public, mostly in opposition to a rate increase.

the issues and public concerns before them. We nevertheless state our support for the assigned Commissioner's decision to hold PPHs in this case.

VII. SBC California's Failure to Respond to Discovery Requests

Consumer Groups allege that SBC California has resisted responding to previous data requests and, following service of its motion, refused to provide responses to any data requests. SBC California did not deny this allegation in any pleading. SBC states in reply comments to the proposed decision that it "notified ORA and TURN on November 14 and 17, 2003, that it objected to providing further discovery responses because it had sought to withdraw its application." This notice was more than two weeks before the ALJ formally suspended the proceeding.

SBC California's refusal to cooperate with parties on matters of discovery was improper. The scoping memo issued in this proceeding and Commission practice presumes that parties will act in good faith during the discovery process. The appropriate course of action for SBC California, if it objected to a discovery request would have been to meet and confer and to raise the issue with the assigned ALJ. Alternatively, SBC California should have filed a motion seeking suspension of discovery pending resolution of its motion to withdraw. As discussed previously, only the Commission may determine the procedural course of this application.

VIII. Withdrawal of Application

The Commission will grant SBC California's motion to dismiss this proceeding at the request of the applicant. Although SBC California presents no justification for closing the proceeding, the pleadings suggest that intervenors prefer the status quo to the substantive outcomes SBC California originally

advocated. We therefore find no compelling reason to pursue the application. We close the proceeding with several conditions.

First, for a period of two years from the date of this order, the Commission will reject for filing any application or advice letter by SBC California that requests recategorization of DA services, including any application or advice letter that incorporates with other matters a request for recategorization of DA. SBC California's application imposed considerable burdens on the Commission and several intervenors and SBC California withdrew its application before the Commission could resolve related issues. Our decision to grant the motion with prejudice for a period of two years recognizes that, in fairness to all utilities, Commission staff and intervenors, the Commission must set priorities to address its substantial workload. We have dedicated enough scarce resources to this issue for the time being and we discourage the filing of future applications that may be arbitrarily withdrawn.

Second, the Commission may incorporate the record of this proceeding into any future applications filed by SBC California for recategorization of DA services. SBC California will have the burden to show that the record in this docket is not relevant to requests in any future application concerning DA services. This condition recognizes the substantial burden on parties and the Commission in litigating SBC California's application and seeks to make efficient use of the existing record in a future application, should one be filed.

Third, we invite Greenlining and TURN to seek compensation for their work in this proceeding pursuant to our intervenor compensation program. Although intervenor compensation is normally granted for work contributing to a final decision on the merits of an applicant's request, there will be no such order in this proceeding. We acknowledge the good faith efforts of the parties to

pursue their constituents' interests in this proceeding and do not believe they should be penalized because we have decided to grant the applicant's request to withdraw the application. At SBC California's urging, we have kept this proceeding open and withdrew from the Commission's August 21, 2003 meeting agenda the ALJ's recommendation to close the proceeding.

We do not order SBC California to reimburse ORA, whose budget is established by the State Legislature with funds collected from customer bills.

In conclusion, we have no reason to believe closing this proceeding will compromise SBC California's customers or the general public and grant SBC California's motion on that basis. Our decision to condition the closure of this proceeding follows from our duty to promote fair and efficient procedures.

IX. Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on February 25, 2004 and reply comments were filed on March 1, 2004. The ALJ made minor changes to this order to clarify her ruling requiring SBC California to include final customer notices in customer bills issued during the normal billing cycle.

X. Assignment of Proceeding

Loretta M. Lynch is the Assigned Commissioner and Kim Malcolm is the assigned ALJ in this proceeding.

Findings of Fact

1. SBC California violated a ruling of the ALJ and the Assigned Commissioner when it failed to take steps to timely notify its customers of PPHs scheduled by the Commission.

2. SBC California acted improperly when it informed ORA and TURN that it would not submit to discovery requests in this proceeding and should have sought permission to suspend discovery pending resolution of its motion to withdraw.

3. The Commission and several parties have expended substantial time and resources processing this application.

4. SBC California presents no justification for closing this proceeding in its filed motion.

5. The Commission has pursued this proceeding at SBC California's urging and contrary to the assigned ALJ's formal recommendation.

6. The Assigned Commissioner's decision to conduct PPHs in this case was responsible and reasonable in light of the public interest in this matter and the facts underlying the application.

7. TURN and Greenlining pursued their constituents' interests in this application in good faith believing SBC California would continue to pursue its application.

8. There is good cause to grant applicant's motion to withdraw its application.

Conclusions of Law

1. Only the Commission may close a contested proceeding.

2. Until the Commission, the assigned Commissioner or the ALJ determines otherwise, the procedural status of a proceeding does not change when a party files a motion for Commission action. A party may not assume its procedural requests are granted until and unless it has received a ruling or order of the Commission.

3. The Commission is within its discretion to reject for good cause the filing of any application.

4. Pursuant to §§ 2107 and 2108, the Commission would be within its discretion to fine SBC California for its failure to pursue the ALJ's directive to notify SBC California's customers of PPHs.

O R D E R

IT IS ORDERED that:

1. The Executive Director shall direct the Commission's Docket Office to reject any filing by Pacific Bell Telephone Company (SBC California) that seeks recategorization of its directory assistance services for two years from the date of this order. SBC California, any successor in interest, and any affiliate making application or any other proceeding the effect of which is to consider recategorization of directory assistance during the next two years shall in its communications or filings make specific reference to this decision and its rationale.

2. Greenlining Institute and The Utility Reform Network are authorized to seek intervenor compensation from SBC California's shareholders for their activities in this proceeding.

3. The application is dismissed.

4. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.